STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 4, 2006
v	No. 258100 Wayne Circuit Court
BRYAN EDWARD WOOD, Defendant-Appellant.	LC No. 04-002413-01

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree child abuse, MCL 750.136b(2), and involuntary manslaughter, MCL 750.321. He was sentenced to ten to fifteen years in prison for each conviction. We affirm.

Defendant first argues the trial court abused its discretion when it granted the prosecution's motion to admit photographs of the victim taken at the morgue. We disagree.

We review for an abuse of discretion a trial court's decision to admit photographs into evidence. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). If an unprejudiced person would find no justification for the ruling, then an abuse of discretion exists. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). A trial court's decision on a close evidentiary question cannot be an abuse of discretion. *Id*. For a photograph to be admissible it must be relevant. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Photographs can be relevant to establish a defendant's intent, negate the defense of accident, corroborate expert testimony concerning the nature and extent of injuries, and assist the jury in determining the credibility of medical testimony. *Mills, supra*, pp 68-74.

Here, defendant claimed the victim's fatal injuries occurred when the victim accidentally fell off the bed and hit the edge of the bed frame, while the prosecution argued that the injuries were a result of being punched in the jaw and chest. The photographs were thus relevant to determine whether the injuries were accidental or intentionally inflicted. *Mills, supra*, pp 68-74; MRE 401. Moreover, the prosecutor was required to prove every element beyond a reasonable doubt, *Mills, supra*, pp 69-70, and "serious physical harm" was one of the elements of first-

degree child abuse, MCL 750.136b(2). The photographs were, therefore, also relevant to show the severity of the victim's injuries. *Mills, supra*, pp 68-74; MRE 401.

Despite the relevancy of the photographs, defendant maintains that the photographs should not have been admitted because their probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. However, the gruesomeness of a photograph does not require that it be excluded as evidence. *Mills, supra*, p 76. Generally, a photograph proffered merely to arouse the sympathy of the jury should not be admitted, but an otherwise admissible photograph is not rendered inadmissible merely because it vividly presents the details of a gruesome or shocking crime. *Id*., p 77. That a photograph is more effective than an oral description and, thus, likely to excite passion does not render it inadmissible. *Id*.

We find the photographs of the victim's injuries, depicting the various bruises on the victim's body, were not particularly gruesome. *Mills, supra*, p 77. Furthermore, the photographs were highly probative because they corroborated the testimony of the prosecutor's expert witness that the victim's death was the result of a closed head injury caused by blunt force trauma sustained from a beating, and the manner of the victim's death was homicide. *Id.*, pp 72-73, 76. They also assisted the jury in determining whether the prosecutor's expert testimony was more credible than defendant's expert testimony that the victim's injuries were accidental. Thus, the photographs were relevant, the probative value of the photographs was not substantially outweighed by any prejudice, and the trial court did not abuse its discretion when it admitted them. *Id*., p 66; *Ho, supra*, p 187.

Defendant next argues the trial court erred when it denied his motion to suppress his statements to the police. We disagree.

Issues of law pertaining to a motion to suppress evidence are reviewed de novo. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003). This Court reviews whether a defendant voluntarily, knowingly and intelligently waived his *Miranda*[1] rights de novo. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). However, we will not disturb a trial court's factual findings regarding a knowing and intelligent waiver unless the findings are clearly erroneous. *Id*. This Court must affirm a trial court's decision unless it is left with a definite and firm conviction that a mistake was made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

A defendant's statements to the police may not be admitted unless the prosecutor demonstrates that, before any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his right to silence and his right to counsel. *Daoud, supra*, pp 633. The prosecutor must demonstrate a valid waiver by a preponderance of the evidence. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004).

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

"Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions." *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether a statement was voluntary is determined by examining police conduct. *Id*. Whether a waiver is knowing and intelligent depends on the totality of the circumstances, including a defendant's intelligence and capacity to understand the given warnings. *Id*. When determining whether a waiver was knowing and intelligent, a court must objectively review, among other things, the education, experience, and conduct of the defendant and the credibility of the police. *Daoud, supra*, pp 633-634. The necessary awareness of the defendant is that of his available options; he need not comprehend the ramifications of exercising or waiving his rights. *Daoud*, *supra*, pp 636-637. The prosecutor must show that the defendant understood he did not have to speak, he had the right to counsel, and the state could use his statement against him in a later trial. *Id*., p 637. "[A] very basic understanding is all that is necessary for a valid waiver." *Id*., p 642.

Here, the prosecution and defendant stated that before defendant gave each of his statements, he was advised of his rights, he initialed each right acknowledging that he understood it, and he signed the rights notification form acknowledging that he had been read his rights and was not threatened or promised anything to make a statement. Defendant admitted that the police were polite and respectful to him and had not threatened him. However, he claimed that he was tired, was hungry, did not understand his rights, and had asked both officers for an attorney. In contrast, the officers stated that defendant did not appear tired; never stated that he was hungry, was tired, or wanted to stop talking; and never asked for an attorney. This Court must defer to the trial judge's finding that the officer's testimony was more credible than defendant's testimony. *Sexton (After Remand), supra*, p 752; *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Therefore, we conclude that the trial court did not err when it denied defendant's motion to suppress. *Sexton (After Remand), supra*, p 752.

Defendant next argues the trial court abused its discretion when it departed from the recommended sentencing range in sentencing defendant. We disagree.

This Court reviews a trial court's sentencing decision to determine whether it is within the appropriate guidelines range. *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). Here, defendant's sentencing guidelines range was fifty-seven to ninety-five months. MCL 777.63. The trial court sentenced defendant to ten to fifteen years in prison on each of his convictions. Thus, defendant's minimum sentences exceeded his guidelines range by twenty-five months. If a sentence is not within the appropriate range, we determine whether the trial court has articulated a "substantial and compelling" reason for departure. *Babcock, supra*. Whether a particular factor exists is a factual determination by the sentencing court that is reviewed for clear error. *Id*., p 264. Whether a particular factor is objective and verifiable is a matter of law. *Id*. The court's determination that objective and verifiable factors constitute substantial and compelling reasons to depart is reviewed for an abuse of discretion. *Id*., pp 264-265. To be objective and verifiable, a reason must be based on actions or occurrences external to the mind and must be able to be confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The reasons for departure may not be premised on an offense characteristic or offender characteristic already considered in computing the appropriate sentence range unless the court

finds from facts contained in the record that the characteristic was given inadequate or disproportionate weight. *Abramski, supra*, p 74, citing MCL 769.34. Citing the nature and brutality of the offense and the vulnerability of the victim, the trial court found the recommended sentence inadequate. Offense variable (OV) 10 was scored ten points. Ten points should be attributed to OV 10 when a defendant exploits, among other things, a victim's youth, a domestic relationship, or the defendant's authority status. MCL 777.40(1)(b). We note that the disjunctive "or" is used in the statute. Therefore, the court needed only to find one of these factors to score OV 10 at ten points. While it noted that the guidelines considered the victim's vulnerability, it indicated the guidelines were inadequate given the victim's young age of three years, defendant's failure as a parent to protect his son, and the difference in size and strength between defendant and his son. Because the court articulated several factors that defendant exploited under MCL 777.40(1)(b), the court properly found that MCL 777.40 was inadequate.

With respect to the nature and brutality of the offense, the court noted the numerous bite marks and bruises, defendant's admission that he boxed the three-year-old in the face to "make him tough," defendant's utter failure to protect his son from abuse, and the fact that the abuse occurred on more occasions than the day the child died. Finding that medical evidence supported the conclusion that defendant beat his young son to death, the court noted that defendant would have been convicted of second degree murder in a bench trial. Thus, the court found that the scoring under MCL 777.37 was inadequate given the nature of the offense.

MCL 777.37(1)(a) provides that fifty points should be scored for OV 7 when a defendant subjects a victim to "sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." As with MCL 777.40, MCL 777.37 uses the injunctive "or." Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). Because the court articulated conduct that satisfied several factors under MCL 777.37(1)(a), we find the court's reasons were objective and verifiable. *Abramski, supra*, p 74. Moreover, the court clearly indicated the offense characteristics were inadequate. *Id.* Hence, we find the court did not abuse its discretion when it departed from the recommended sentence. *Babcock, supra*, pp 258 n 12, 264-265.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood